That the premises are within and under the jurisdiction of the Local Council of Kampong Koh is not disputed. Appellant himself admitted that when he gave evidence to the effect that the land was within the Local Council of Kampong Koh which was given a local council status in 1954. Quite clearly the Local Council of Kampong Koh was established under the Local Council Ordinance, 1952. That being so, the land in question must be considered to be within the definition of a "Local Authority".

With respect, the position was summed up by the learned judge very nicely when he said: —

"The effect of the definition is that any premises which are situated in the area and jurisdiction of a Municipality, Town Council, Town Board, Rural Board or Local Council receive the protection of the Act provided they are controlled premises."

Since it had been established that the building was built long before 1948 it is clear that under section 4 of 1966 Act the onus rests upon the appellant as the landlord to show that the premises in question are not protected by the said Act or that the Act does not apply.

For the purpose of this appeal it is only necessary to refer to the relevant provisions of section 4 which reads: —

"4. (1) Except for the premises mentioned in subsection (2) all premises shall be subject to the operation of the provisions of this Act and any such premises shall for the purposes of this Act be called 'controlled premises'.

(2) The following premises shall be free from the operation of any of the provisions of this Act, namely:—

(a) buildings completed after the 31st day of January, 1948; ...."

In brief, under the section all premises are presumed to be controlled premises and subject to the Act with the exception of those premises referred to in section 4(2). Again, with respect to the learned judge, he was perfectly right to say: —

"Under section 4(1) of the Act all premises are deemed to be subject to the provisions of the Act unless they are covered by section 4(2) or are such that the Act cannot be said to apply to them. The presumption consequently is that the premises in a Local Council Area are rent controlled premises. It thus becomes the duty of the landlord to show that the premises in question are not protected under the Act."

The reason why the onus rests on the landlord and not on the tenant was given by Suffian F.J., as he then was, in *Yong Chiang* v. *Bong Tjhin Oi*[1]: —

"If I had to decide this point on general principles, I would say that it is for the tenant to prove that the shophouse is subject to the Act, because the general rule is that a landlord is free to impose any condition as to rent, security of tenure, etc., he pleases on his property, and if the tenant seeks protection against a notice to quit given by the landlord, it is for him to prove that he (the tenant) is protected by any special terms in the lease or by any special legislation. But the position is that the general principle has been expressly altered by statute, namely, section 4 of the Act, ...".

Unless the appellant can bring his case within any of the grounds set out under section 16 of the Act he cannot, in my view, succeed in his claim. Like the learned judge, I do not consider it to be necessary to go into other points raised. I would dismiss the appeal with costs here and in the courts below.

Appeal dismissed.

Solicitors: *Maxwell, Kenion, Cowdy & Jones; Lim Seong Chun & Co.*

SAU SOO KIM v. PUBLIC PROSECUTOR

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) and Ali F.J.) April 12, 1975]

[Kuala Lumpur — Federal Court Criminal Appeal No. 22 of 1974]

Criminal Law and Procedure — Joint trial of appellant and another accused — Appellant acquitted at trial but other accused convicted — On appeal by other accused his trial declared nullity — Appellant subsequently charged on different charges for offences arising out of same facts — Appellant convicted on pleading guilty — Appeal by appellant — No right of appeal — Whether plea of autrefois acquit available to appellant — Sentence — Criminal Procedure Code (F.M.S. Cap. 6), ss. 302 — Courts of Judicature Act, 1964, s. 50(2).

In this case the appellant and one Tan Soo Hor were jointly charged before the High Court in Ipoh for an offence under section 3 of the Firearms (Increased Penalties) Act, 1971. At the conclusion of the trial before a jury the appellant was acquitted but Tan Soo Hor was convicted. Tan Soo Hor appealed to the Federal Court and the Federal Court declared that his trial was a nullity and ordered that the conviction and sentence imposed upon him be set aside. Subsequently the appellant and Tan Soo Hor were separately tried and on different charges for offences arising out of the same facts and circumstances as the earlier case. The appellant pleaded guilty and he was convicted and sentenced to ten years' imprisonment on the first charge, four years on the second charge and four years on the third charge. The appellant appealed to the Federal Court.

Held (Lee Hun Hoe C.J. (Borneo) and Ali F.J., Suffian L.P. dissenting): (1) The proviso to section 50(2) of the Courts of Judicature Act, 1964, should be adhered to strictly in this case where the appellant was represented by counsel, and therefore as the appellant had pleaded guilty there could be no appeal except as to the extent or legality of the sentence;

(2) in this case the plea of *autrefois acquit* would not have been available to the appellant at the trial, had he raised it, as the first trial had been declared a nullity;

(3) in the circumstances of this case the sentences on the second and third charges should run concurrently.

Cases referred to:-

(1) *Yue Sang Cheong Sdn. Bhd.* v. *Public Prosecutor* [1973] 2 M.L.J. 77.
(2) *R.* v. *Bowman* 6 C. & P. 337.
(3) *R.* v. *Bates* [1912] 1 K.B. 964.
(4) *R.* v. *Marsham* [1912] 2 K.B. 362.
(5) *Yusoffalli Mulla Noorbhoy* v. *King* A.I.R. 1949 P.C. 264, 267.
(6) *R.* v. *Kastercum* (1972) 56 Cr. App. R. 298.
(7) *R.* v. *Faulkner* (1972) 56 Cr. App. R. 594.
(8) *Wong Lai Fatt* v. *Public Prosecutor* [1973] 2 M.L.J. 31.

FEDERAL COURT.

Datuk S. P. Seenivasagam for the appellant.

Lamin bin Haji Yunus (Deputy Public Prosecutor) for the respondent.

Suffian L.P.: This criminal trial has given us a great deal of trouble, and consequently we are taking the unusual step of delivering three separate judgments. Both my learned brethren are not here, and in their absence I shall read first the judgment of the learned Chief Justice and then that of my brother Ali, followed finally by mine.

Lee Hun Hoe C.J. (Borneo) (read by **Suffian L.P.**): This is an appeal against conviction and sentence. The appeal raises important questions concerning the right to appeal against conviction after a plea of guilty and the rules relating to the plea of *autrefois acquit*.

On July 14, 1972 appellant and Tan Soo Har were jointly charged before the late Sharma J. in the High Court at Ipoh for an offence under section 3 of the Firearms (Increased Penalties) Act, No. 37 of 1971. The trial was before a jury. At the conclusion of the trial appellant was acquitted but Tan Soo Har was convicted. The latter appealed to this court against his conviction. On December 4, 1972 this court allowed his appeal declaring that his trial was a nullity. No reason was given in the record before us and the order simply reads: —

"This court doth declare that the trial of the appellant (Tan Soo Har) is a nullity and it is ordered that the conviction and the sentence imposed upon the appellant be and are hereby set aside."

Subsequently, on September 26, 1974 appellant and Tan Soo Har were separately tried and on different charges. At the retrial before Arulanandom J. the charge against Tan was amended from section 3 to section 4 of the Firearms (Increased Penalties) Act, No. 37 of 1971. To this charge he pleaded guilty and was convicted and sentenced to 18 years' imprisonment to run on the expiry of the sentence he was then serving. We are not here concerned with his sentence. As regards appellant three charges were preferred against him. The first charge was under section 307 of the Penal Code for the act of firing at a police party with a revolver. The second and third charges were both under section 3(1) of the Arms Act, No. 21 of 1960 and punishable under section 9(a) of the said Act. He was represented by the same counsel at both the trial and the retrial. He also pleaded guilty to the charges. Consequently, he was sentenced to 10 years' imprisonment on the first charge, 4 years on the second charge and 4 years on the third charge. The sentences to run consecutively. Hence, the appeal.

It was argued that as appellant was acquitted on July 14, 1972 he could not be subsequently charged on September 26, 1974 for offences arising out of the same facts and circumstances. Further, he was not a party to the appeal when this court declared the trial of Tan to be a nullity. The order is said to be effective against Tan only. The order of acquittal has never been quashed so that it still remains in force. Counsel for appellant could have raised the plea of *autrefois acquit* at the retrial pursuant to section 303 of the Criminal Procedure Code but never did. If it had been raised, perhaps the learned judge would not have accepted the plea of guilty.

In this appeal, Dato Seenivasagam submitted that that was merely an irregularity which could be cured. Since the point had been raised this court could deal with it. He stressed that points of law could be raised at any time. In support he referred to a passage in *Mallal's* Criminal Procedure, 3rd Edition, page 378 dealing with section 322 of the Criminal Procedure Code (which could also be found in the 4th Edition at page 481) which reads: —

"A question of pure law which may be decided on the materials already on the record may be taken for the first time before the High Court although it has not been taken in any of the courts below. No question of fairness to the trial magistrate arises and the application should be heard. *Shailabala Devi* v. *R.* (1933) 34 Cr. L.J. 1115 @ pp. 1122 and 1124 (F.B.)."

On the powers and functions of the appellate court he quoted another passage from the same edition at page 355 which reads as follows: —

"On an appeal from an order of acquittal on a matter of fact the High Court has full power to review at large the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed. There is no limitation or restriction on the High Court in the exercise of its powers as an appellate tribunal, and its interference with an order of acquittal, passed by the trial court is not limited to cases where the trial court has 'obstinately blundered' or has 'through incompetence, stupidity or perversity' reached such 'distorted conclusions as to produce a positve miscarriage of justice,' or has in some other way so conducted or misconducted itself as to produce a glaring miscarriage of justice, or has been tricked by the defence so as to produce a similar result. *Sheo Swarup & Ors.* v. *R.* 67 Mad. L.J. 644 (P.C.); 51 T.L.R. 10."

He drew the attention of the court to the decision of this court in the case of *Yue Sang Cheong Sdn. Bhd.* v. *Public Prosecutor*[1] for the propositions that this court could exercise its power of review and interfere with the decision of the learned judge, if it was satisfied that the decision was wrong. In that case H. T. Ong, then C.J., and H. S. Ong F.J. took that view from which Gill F.J., as he then was, dissented. H. T. Ong C.J. expressed his opinion rather strongly thus: —

"For my own part, however, I feel that it is not only the right, but also the duty of this court to see that justice is done and seen to be done in all cases brought before us in accordance with established rules of procedure. As Viscount Radcliffe said in *Ibralebbe* v. *Reg.* ([1964] 1 All E.R. 251 & 257). 'Justice is owed; it is not granted by favour or accorded at discretion.' If, in the instant case, the conviction was wrong by reason of its being against the weight of evidence, it surely cannot be right of this court to wear blinkers and treat the questions of law raised as being purely of academic interest and thus allow the conviction to stand."

In my view each case must of course be decided according to its particular facts. In this appeal we are concerned with the effect of nullity of a trial. It was not in dispute that at his retrial appellant was charged on the same facts but on different charges for different offences. At both his trial and retrial he was represented by the same counsel. It is inconceivable that his counsel has not raised the plea of *autrefois acquit* at the retrial unless he has good reason for not doing so.

Encik Lamin drew the attention of the court to the proviso of section 50(2) of the Courts of Judicature Act, 1964. This makes clear that where an accused person has pleaded guilty and been convicted on his own plea there shall be no appeal except as to the extent or legality of the sentence. Where an accused, as in the case of the appellant, is legally represented at the trial the proviso should be adhered to strictly. But, where an accused person is not represented by counsel at the trial then perhaps an appellate court should peruse the record of the trial carefully to satisfy itself that there is no irregularity giving rise to miscarriage of justice. Being unrepresented he would not have the benefit of legal advice. It is thus proper for an appellate court in such a situation to correct miscarriage of justice arising from misconception of law, irregularity of procedure or apparent harshness of treatment resulting in injury or undue hardship to such an accused. For example, if an accused pleaded guilty to a charge which creates no of-

fence known to law and further the facts also disclose no offence, clearly such a conviction could not be allowed to stand. Surely, such a plea of guilty to what is not an offence is no plea at all.

The common law rule is that no man should be placed twice in jeopardy. Under the common law a plea of *autrefois acquit* or *autrefois convict* could only be raised where the first trial was before a court of competent jurisdiction to pass a valid order of acquittal or conviction. See *R.* v. *Bowman*;[2] *R.* v. *Bates*[3] and *R.* v. *Marsham*.[4] Those are cases in which there had been conviction but the same principle applies to an acquittal.

The same common law rule has been codified in the Criminal Procedure Code (F.M.S. Cap. 6) particularly Chapter xxix. For the purpose of this appeal it is sufficient to refer to two relevant provisions which read: —

"302. (i) A person who has been tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence nor on the same facts for any other offence for which a different charge from the one made against him might have been made. . . .

(v) The dismissal of a complaint, or the discharge of the accused, is not an acquittal for the purposes of this section."

Section 303 emphasises the procedure relating to the plea of previous acquittal or conviction. Once this plea is raised it is usually disposed of first before other issues are dealt with.

Section 302 of our Criminal Procedure Code is in *pari materia* with section 403 of the Indian Criminal Procedure Code which was discussed by the Privy Council in *Yusoffalli Mulla Noorbhoy* v. *The King*.[5] That case seems to support the proposition that if a trial is a nullity then an order of acquittal would not be binding even if it is not appealed against and set aside though the order could be quashed on an application to the appropriate court. Encik Lamin quite properly indicated his difficulty in the matter. He could not appeal against an acquittal as there was no ground for doing so. Also, section 64(1) of the Courts of Judicature Act, 1964 provides that an appeal against an order of acquittal made by the High Court could only be by way of reference on a point of law which it is desirable for the court to determine. That perhaps is the best course. However, he has no reason to appeal since the plea of *autrefois acquit* was not raised in the High Court at the retrial. He also made the point that once this court declared the joint trial a nullity it became irrelevant whether appellant was a party to that appeal. I think there is much force in his contention. It would create a ridiculous situation to hold that in a joint trial although the High Court is not competent to convict it is competent to acquit. Logic and commonsense would demand that once a joint trial has been declared a nullity it must follow that no order made in such trial by the trial court would be of any effect.

That is what precisely happened in *Yusoffalli's* case. In that case the magistrate acquitted an accused on the ground that the prosecution had not obtained a proper sanction and not that prosecution had failed to prove their case. The magistrate ought to have discharged the accused on the ground that he was not competent to try him. The order of acquittal was, therefore, made without jurisdiction and could only operate as an order of discharge. Section 302(v) of the Criminal Procedure Code provides that the discharge of an accused does not amount to an acquittal for the purpose of the section. As the trial was a nullity there was in fact no trial so that appellant could not be said to be in jeopardy. The whole basis of section 403 of the Indian Code is that the first trial should be before a court of competent jurisdiction. The court should be competent to determine the case and record a conviction or acquittal. Therefore, if the joint trial was a nullity and the High Court could not convict, it must follow it could not also acquit. Consequently, appellant must be regarded as having been discharged. The order of acquittal could only operate as a discharge. Therefore, it could not bar a second trial on the same facts. In other words, section 302(1) of our Code does not assist appellant in such a situation. This could very well be the reason why counsel for appellant did not raise the plea of *autrefois acquit* at the retrial as he realised the futility of such a plea and had perhaps advised appellant accordingly with the result that appellant decided to plead guilty.

As regards sentence the question whether the sentences should run consecutively or concurrently must depend upon the particular circumstances of the case. The learned judge was right to take a serious view of the unlawful use of a firearm. It is right to deal severely with a person for using a firearm on a police officer especially when such person has no licence to possess one. In the case of a known criminal such possession must be deemed to be for unlawful purposes.

The tendency of the English courts in inflicting consecutive sentences for a substantive offence and for an assault on police officer is reflected in such recent cases as *R.* v. *Kastercum*[6] and *R.* v. *Faulkner*.[7] In the first case appellant pleaded guilty to robbery and assault on a constable. The court sentenced him to consecutive terms of 4 years and 1 year's imprisonment. In the second case, appellant was convicted of conspiring to commit theft, for which he received 2 years' imprisonment; *having a firearm with intent, 3 years;* using a firearm with intent, 3 years; no firearm certificate, 1 year; having articles for theft, 1 year; *assault occasioning actual bodily harm, 3 years;* and lastly assault on a police constable, 2 years. The sentences were to run concurrently except that the sentences for the two offences which I have italiczed above, namely, of having a firearm with intent and of assault occasioning actual bodily harm were to be consecutive. The total sentence he was to serve was six years. At page 596 the Lord Chief Justice observed: —

"It is very important that this matter of sentencing practice should be appreciated at a time when every possible course must be taken by the courts to persuade people not to carry firearms. Therefore in this case where the second sentence of three years was made consecutive and was one relating to the carrying of a firearm, this court would wish to stress that that was a perfectly proper approach to the problem, and one which should be followed. *However, at the end of the day, as one always must, one looks at the totality and asks whether it was too much.* For this purpose the court is able to ignore the foreign sentences because there is still some question whether they were imposed in his absence or otherwise im-

posed according to the standards which we would normally expect in this country. Therefore we approach this matter on the footing that the foreign sentences should be disregarded. In this country he had really one conviction for crime and that was for forgery in 1963. He is a bird of passage; following a secondary school education he has been a welder and tree feller, and for five years living in Europe he has moved about working as a ski instructor and skin diver. We have to ask ourselves whether the six years is too great a sentence for the catalogue of offences which I read out at the beginning of this judgment. We do not think it was and the appeal will therefore be dismissed."

Whether a person is a hardened criminal or not, I feel that a plea of guilty should be treated as a mitigating factor. It not only saves the country a great expense of a lengthy trial but also saves time and inconvenience of many, particularly the witnesses. While I cannot say that the sentence on each charge is excessive or unreasonable, I do feel that the totality of 18 years is rather severe in the circumstances. In the two English cases the totality of the consecutive sentences in each case does not amount to more than 6 years. In *R.* v. *Faulkner*[8] the consecutive sentences were only imposed on two offences out of a variety of offences. In this appeal the appellant would have no ground to complain if the same discretion was used, namely, that the sentences — second and third charges were to run concurrently, so that altogether he will serve a total sentence of 14 years. The second and third charges are in fact of the same nature. It is similar to charging an opium addict for smoking opium, for possession of the pipe and for having the opium in his pipe. Subject to the variation of sentence from 18 years to 14 years the appeal should be dismissed.

Ali F.J.: On September 26, 1974 the appellant, Sau Soo Kim @ Tai Tau Chye, was tried in the High Court at Ipoh, Perak on the following charges:

1st Charge —

"That you on 18th of October, 1971 at about 10.45 p.m. in a vacant area, in front of premises No. 28, Chamberlain Road, Ipoh, in the District of Kinta, in the State of Perak, did an act, to wit, fired at a Police Party with a revolver, with such knowledge and under such circumstances that if you by that act had caused the death of one S.K. Puvaneswaran, ASP., you would have been guilty of murder and you have thereby committed an offence punishable under section 307 of the Penal Code."

2nd Charge —

"That you on 18.10.71 at about 10.45 p.m. in a vacant area in front of premises No. 28, Jalan Chamberlain, Ipoh, in the District of Kinta, in the State of Perak, did have in your possession a firearm, to wit, a .38 Wembley revolver No. 31225 without a licence granted to you under the provisions of section 4 of the Arms Act No. 21/60 and that you have thereby committed an offence under section 3(1) and punishable under section 9(a) of the said Act."

3rd Charge —

"That you on the same day, time and place, did have in your possession 5 rounds of ammunition without a licence granted to you under the provisions of section 4 of the Arms Act No. 21/60 and that you have thereby committed an offence under section 3 and punishable under section 9(a) of the said Act."

He pleaded guilty to all the three charges and was convicted. He was sentenced to 10 years on the first charge, 4 years on the second charge and another 4 years on the third charge. The learned judge acting apparently under paragraph (f) of section 282 of Criminal Procedure Code directed sentences to run consecutively.

The appellant has now appealed to this court against sentence as well as against conviction. His reason or reasons for appealing against conviction are stated in paragraph 1 of the petition of appeal as follows:

"1. (a) On the 14th day of July, 1972, the appellant was jointly charged with one Tan Soo Har, at the Ipoh High Court, for an offence under section 3 of the 1971 Firearms (Increased Penalties) Act.

(b) At the conclusion of the said trial the appellant was duly acquitted but the said Tan Soo Har was convicted.

(c) Against the conviction, the said Tan Soo Har appealed to the Federal Court.

(d) The said appeal was disposed of on the 4th of December, 1972 whereat the Federal Court held that the High Court trial of the appellant was a nullity.

(e) The appellant was not a party to the said appeal and the order extracted from the Registry clearly shows that it is effective against the said Tan Soo Har only.

(f) The appellant says that having been duly acquitted by the High Court on the 14th day of July, 1972, he could not have been charged on the 26th day of September, 1974, for offences arising out of the same facts and circumstances."

The trial which I shall refer to as the first trial commenced on June 9 and concluded on July 14, 1972. It was before the late Sharma J. sitting with jury who at the conclusion of the trial found the appellant not guilty by a majority verdict of 6 to 1. He was accordingly acquitted. Tan Soo Har was found guilty, also by a majority verdict of 6 to 1 and was convicted. Tan's appeal against conviction was allowed by the Federal Court on the ground that his trial was a nullity. The reason or reasons for the Federal Court's decision are not before us but its order dated December 4, 1972 reads as follows:

"This court doth declare that the trial of the appellant (Tan) is a nullity and it is ordered that the conviction and the sentence imposed upon the appellant (Tan) be and are hereby set aside."

On September 26, 1974 both the appellant and Tan were again charged in the High Court at Ipoh before Arulanandom J. sitting alone. This time they were tried separately. It is common ground that at the second trial the charge or charges against each of them, as the case may be, were based on the same facts as in the first trial. As already stated, the appellant pleaded guilty to all the charges against him and was convicted in accordance with section 178(ii) of the Criminal Procedure Code. The question which necessarily arises and which did arise is whether there can be an appeal against conviction; or to put it differently whether the appellant has the right to appeal against conviction. The matter seems to be governed by subsection (2) of section 50 of the Courts of Judicature Act No. 91 of 1964 (Revised 1972) which provides —

"(2) An appeal by a person convicted shall be either against the conviction or against the sentence or against both;

Provided that when an accused person has pleaded guilty and been convicted on the plea there shall be no appeal except as to the extent or legality of the sentence." (The italics are mine).

The words of the proviso being so precise and clear I have no hesitation in saying that in the events stated above the appellant has no right of appeal

against conviction. It follows, I think, that this court has no jurisdiction to hear this appeal. In my opinion the jurisdiction conferred on this court by subsection (1) of section 50 to hear and determine an appeal against conviction is to be confined only to appeals by persons who by statute are given the right to appeal. I am, therefore, unable to agree with Mr. Seenivasagam's submission that the plea of previous acquittal being a question of law may be raised by way of appeal as in this case. In terms of section 303 of the Criminal Procedure Code a plea of previous acquittal may be raised at the second trial. It may be raised at any stage of the trial. But it was not raised. Why we do not know. We know, however, that the appellant was represented by counsel who could have advised him of his rights but apparently did not. To raise the plea in bar by way of an appeal as at present is to overlook the clear effect of the proviso to subsection (2) of section 50 of the Courts of Judicature Act. I regret to say that this court has no jurisdiction to hear the appellant's appeal against conviction. It may be argued that the decision of the Federal Court, of which I was a member, in *Wong Lai Fatt* v. *Public Prosecutor*[8] runs counter to the view I am now taking of subsection (2) of section 50 of the Courts of Judicature Act. I am satisfied it does not so run as the case was decided per curiam having regard to its particular facts.

On the question whether the plea of previous acquittal is available to the appellant it is relevant to consider the effect of subsection (1) of section 302 of the Criminal Procedure Code which is in *pari materia* with section 403(1) of the Indian Criminal Procedure Code. In the Privy Council case of *Yusofalli Mulla Noorbhoy* v. *The King*[5] Sir John Beaumont delivering the judgment of the Judicial Committee said on page 266 of section 403(1) of the Indian Criminal Procedure Code as follows:

"The whole basis of section 403(1) is that the first trial should have been before a court competent to hear and determine the case and to record a verdict of conviction or acquittal."

If that is also the basis of section 302(1) of our Code then it is implicit from the order of the Federal Court declaring Tan's trial a nullity that the court before which the trial was held was not a court of competent jurisdiction within the meaning of the subsection. But the appellant has contended that since he was not a party to the appeal the order of the Federal Court is not binding on him. This is tantamount to saying that the court before which the first trial was held was competent to record a verdict of acquittal but not competent to recording a verdict of conviction. I do not think such a curious situation exists or can exist in law. A contention somewhat similar to the contention raised by the appellant was rejected by the Privy Council in *Yusofalli Mulla Noorbhoy's* case. On page 267 Sir John Beaumont said:

"The next contention was that as the orders of acquittal passed by the learned magistrate in the first prosecution were not appealed from they became binding on the expiration of the period limited for appeal by Article 157, Limitation Act. This is merely to regard another aspect of the same problem. If the orders of acquittal were passed by a court of competent jurisdiction, though wrongly, they would be binding unless set aside in appeal. But if the orders were a nullity there was nothing to appeal against. It may well be that the Government, if embarrassed by the orders of acquittal, might have applied to the High Court to quash them, and in this connection reference may be made to the decision of the House of Lords in *Crane* v. *Director of Public Prosecutions* ([1921] 2 A.C. 299; 90 L.J.K.B. 1160). But the omission of Government to take such a step, which was not incumbent, could not convert an order made without jurisdiction into an order passed by a court of competent jurisdiction."

In my judgment in view of the order of the Federal Court declaring the first trial a nullity the plea of previous acquittal is not available to the appellant. The verdict of acquittal at the first trial can only operate as an order of discharge. In the Indian case above cited the Magistrate at the first trial had acquitted the accused on the ground that the sanction to prosecute was invalid. Taking the view that a prosecution launched without a valid sanction is a nullity Sir John Beaumont said on page 267:

"The orders of acquittal were passed without jurisdiction, and could only operate as orders of discharge."

As regards the appeal against sentence I respectfully agree with the Chief Justice Borneo that sentence be varied from 18 years to 14 years.

Suffian L.P.: I shall now read my own judgment.

With respect to my learned brethren I am of the opinion that this appeal should be allowed.

The facts and arguments have been amply set out in their judgments which I had the advantage of seeing in draft, and there is no need for me to repeat them.

I am of the opinion that this appeal should be allowed for the following reasons.

To my mind, there is no doubt that on July 14, 1972, when he was tried before Sharma J. and a jury, the appellant was being tried by a court of competent jurisdiction. *Yusoffalli's* case is distinguishable; there the accused could have been tried only if the prosecution had obtained a proper sanction, which they had not done, and so it was held by the Privy Council that the trial was a nullity. Here on the other hand there was no question of a sanction to prosecute. The prosecution was perfectly valid and therefore the trial court was one of competent jurisdiction.

It is true that this court, on an appeal by the appellant's co-accused, declared the trial a nullity, but the order so declaring was made in an appeal by the co-accused, in that appeal this appellant was not heard, and the formal order of this court referred only to the trial of the *co-accused* as a nullity and not to the trial of this appellant and it did *not* purport to quash the acquittal of this appellant.

The scheme of our legislation is stark clear. Where a person has been convicted by the High Court in the exercise of its original criminal jurisdiction the accused may appeal, see section 50 of the Court of Judicature Act, Act 91. But where he has been acquitted by the High Court in the exercise of its orginal criminal jurisdiction *nobody* can appeal. At the most the Public Prosecutor may ask the High Court to refer to the Federal Court a question of law, and the High Court then delivers a declaratory judgment on that point, and that judgment in the words of subsection (2) of section 64 of the Act "shall not operate to reverse an order of acquittal". With respect it is plain to me that Parliament intends that there should be finality in the

verdict when the High Court acquits a person tried by it and that that acquittal should remain in force — unless of course the prosecution was invalid because of the want of necessary sanction.

This acquittal could not have been quashed and in my view has not been quashed by this court.

Applying both subsection (i) of section 302 of the Criminal Procedure Code and clause (2) of article 7 of the Constitution which read:

"302. (i) A person who has been tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 166 or for which he might have been convicted under section 167."

"7. (2) A person who has been acquitted or convicted of an offence shall not be tried again for the same offence except where the conviction or acquittal has been quashed and a retrial ordered by a court superior to that by which he was acquitted or convicted."

I would therefore have allowed this appeal.

The order of the court is that this appeal be dismissed, the convictions be affirmed but the sentences be varied as stated in the judgment of the learned Chief Justice.

Appeal dismissed.

Solicitors: *Seenivasagam & Co.*

KEE PENG KWAN v. COLONEL V.N. STEVENSON & ORS.

[F.C. (Suffian L.P., Ong Hock Sim F.J. and Chang Min Tat J.) April 22, 1975]

[Kuala Lumpur — Federal Court Civil Appeal No. 152 of 1974]

Administrative Law — Application for order of prohibition — Proceedings before General Court Martial — Plea to jurisdiction of court — Allegation that charge not investigated into by Commanding Officer — Who is Commanding Officer of applicant — Malay Regiment Enactment (F.M.S. Cap. 42), ss. 42(1), 124(7) and 117A.

Armed Forces — Malay Regiment — General Court Martial — Jurisdiction.

The appellant had been charged with an offence under section 14 of the Malay Regiment Enactment for fraudulent misapplication of Government property entrusted to his care. At the trial counsel for the appellant had offered a plea to the jurisdiction. It was alleged that the Commanding Officer of the appellant had not investigated into the charge against him. The Court Martial after hearing the evidence and submissions allowed the plea and duly reported to the convening officer under Rule 36(2) of the Rules of Procedure (Army) 1956. The convening officer then purporting to act pursuant to Rule 36(3) directed the Court Martial to proceed with the trial. The court was then reconvened. The appellant subsequently applied for an order of prohibition prohibiting the General Court Martial from proceeding with the hearing of the charge against the appellant. The application was dismissed in the High Court and the appellant appealed to the Federal Court.

Held: the materials before the court were insufficient to show that Major Idrus, who investigated in this matter, was the Commanding Officer of the appellant according to law. The Court Martial was correct in coming to the conclusion that it had no jurisdiction and there was no foundation, either in law or in fact for over-ruling the finding of the Court Martial on the question of absence of jurisdiction. In the circumstances prohibition must lie.

Case referred to:-

(1) *Grant* v. *Gould & Ors.* (1792) 2 Hy. Bl. 69.

FEDERAL COURT.

Wong Chong Wah (*H. Jayaraam* with him) for the appellant.

Tam Kam Weng (Senior Federal Counsel) for the respondents.

In the court below, *H. Jayaraam* appearing for the applicant and *Noor Hamid bin Mohamed Noor* for the respondents, the following judgment was delivered on October 24, 1974:

Abdul Hamid J.: This is an application by Major Kee Peng Kwan (1) for an order of prohibition prohibiting the General Court Martial or its President or Members from proceeding with the hearing of a charge against him under section 14 of the Malay Regiment Enactment (F.M.S. Cap. 42); (2) for the proceedings before the General Court Martial to be stayed after the determination of this motion.

The court is essentially concerned with prayer (1). The grounds upon which the relief is sought are as follows —

(a) The General Court Martial has no jurisdiction to hear the charge against the applicant since the Commanding Officer of the accused (applicant) has not investigated the charge and that the essential preliminary steps envisaged in section 42(1) of the Malay Regiment Enactment have not been complied with;

(b) Rule 36(b) of the Rules of Procedure (Army) 1956 which permits the Convening Officer to direct the General Court Martial to proceed with the hearing of the charge despite its finding of no jurisdiction is *ultra vires* and unconstitutional;

(c) There is an error on the face of the direction given by the Convening Officer to the General Court Martial, and the said direction cannot confer jurisdiction on the General Court Martial having held that it has no jurisdiction; and

(d) Any finding that the General Court Martial may make after the hearing of the charge will be null and void and of no effect.

Ground (d) is merely consequential. It would only arise if this court should rule that the General Court Martial had no jurisdiction to hear the charge against the applicant.

The applicant affirmed an affidavit to the effect that he was brought before the General Court Martial on January 29, 1973 to be tried for fraudulent misapplication of public property under section 14 of the Malay Regiment Enactment. At the trial counsel appearing for the applicant offered a plea to the jurisdiction and evidence was adduced to show that section 42(1) of the Malay Regiment Enactment had not been complied with. The applicant alleged that the person who investigated the offence was not his Commanding Officer.

The General Court Martial allowed the defence plea of jurisdiction and acting under Rule 36(2) of the Rules of Procedure (Army) 1956, the General Court Martial adjourned and reported its finding to Col.